

PUBLIC DEFENSE 101



Challenging the Identification

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Kat

Appellate Defender

Eyewitness Identification – Getting it Right

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Does the identification meet the requirements of Due Process?

- ▣ Neil v. Biggers, 409 U.S. 188, 195, 93 S. Ct. 375, 380, 34 L. Ed. 2d 401 (1972).

Two Prong Test:

1. Unnecessarily Suggestive Police ID Procedure?
State v. Wyatt, 421 S.C. 306, 806 S.E.2d 708 (2017).

If yes:

2. Is it **reliable** despite the suggestive procedure - no substantial likelihood of misidentification? Totality of the circumstances
State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012)

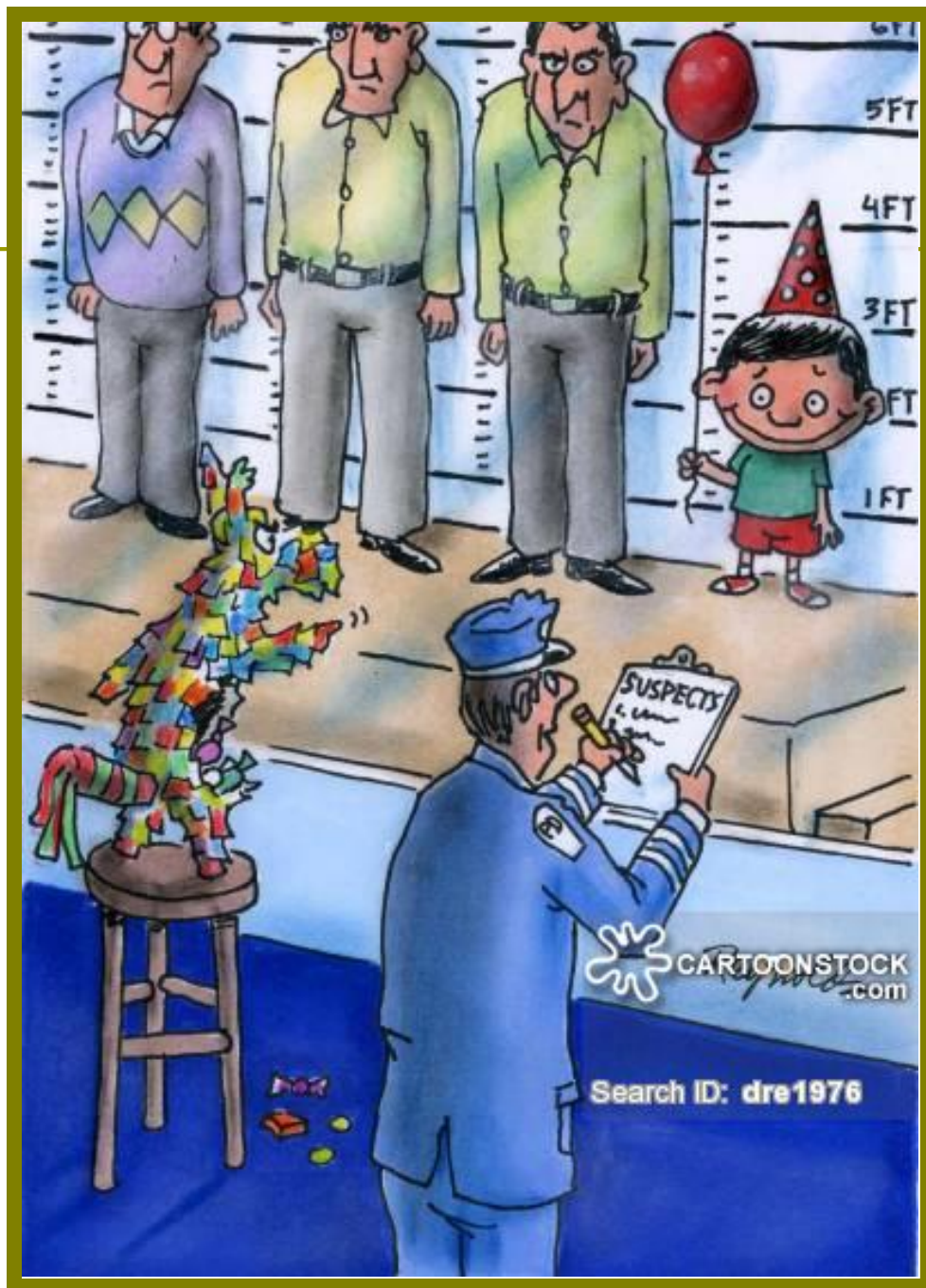
What is a suggestive police ID procedure?

- 1. Show Up IDs are inherently suggestive
- Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d. 1199 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned).
- State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

Other Suggestive Police ID Procedures

- ❑ 1. Physical Characteristics – height, weight, age, hairstyle, race, clothing etc
- ❑ 2. Lighting
- ❑ 3. Shadows





Search ID: dre1976





Suggestive Police ID Procedure = Move for Hearing

- ❑ 1. Identification Hearing
- ❑ 2. Neil v. Biggers Hearing
- ❑ 3. Biggers Hearing

- ❑ Pre-Trial
- ❑ Outside the presence of the jury – in camera
- ❑ Rule 104(c) SCRE

The Hearing

□ Witnesses:

- Investigating Officer
- Officer who compiled lineup
- Officer who showed lineup
- Identifying witness

□ Exhibits

- The 6 pack lineup
- The Report

6 - Pack Lineup

LineUp ID:

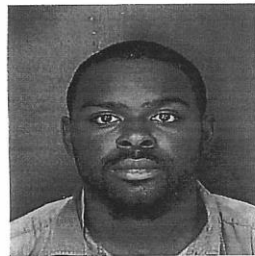
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Officer: Perkins

Subject ID: 0000273654

Requested By: Perkins

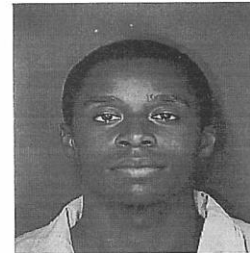
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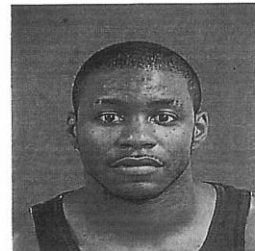
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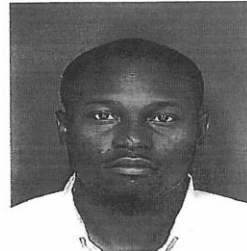
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REPORT

CHARLESTON COUNTY SHERIFF'S OFFICE
3505 PINEHAVEN DRIVE
CHARLESTON HEIGHTS, SC 29405-7789



CRIMINAL INVESTIGATIONS DIVISION
(843) 554-2473

J. AL CANNON, JR., ESQ.
SHERIFF, CHARLESTON COUNTY

Report of Photographic/Physical Lineup

OCA #: 2011-0200743 Date: 11-7-11
Time: 12:25 Location: 3505 Pinehaven Dr.
Investigating Deputy: Det. J. Perkins
Identifying Witness (name & DOB) _____

- I am 1. I am going to show you a series of photographs/physical lineup of individuals or an array of six photographs of individuals (circle appropriate one). The photographs that I am about to show you are placed in no special order.
- I am 2. These photographs may or may not be the person who committed the crime. It is just as important to clear innocent people as it is to identify possible suspects. Whether or not you identify someone, the police will continue to investigate.
- I am 3. After you are done, I will not be able to provide you with any feedback or comment on the results of the process.
- I am 4. Do not discuss this identification procedure or the results with other witnesses in this case.
- I am 5. Focus on the event: the place, view, lighting, your frame of mind, etc. Take as much time as you need.
- I am 6. People may not appear exactly as they did at the time of the event, because features such as clothing style, hair color, hair style, etc. may change, even in a short period of time.
- I am 7. As you look at the photographs, tell me if you recognize the person in them. If you do, please tell me how you know the person, and in your own words, how sure you are of the identification.

Witness Identification Statements

Identification Made: Yes ☒ No ☐

He looks most like the person that carjacked me & tried to kill me.

Independent Adminstrating Deputy's Signature

Christina Smith
Print Name

Deputy Sheriff's Signature

JAMES PERKINS
Print Name

Witness Signature

[Signature]
Print Name



01/04/10

Prong 2 - 5 Factors of Reliability

- ❑ (1) the witness's opportunity to view the perpetrator at the time of the crime
- ❑ (2) the witness's degree of attention
- ❑ (3) the accuracy of the witness's prior description of the perpetrator
- ❑ (4) the level of certainty demonstrated by the witness at the confrontation
- ❑ (5) the length of time between the crime and the confrontation.

Suggestive? YES

Necessary? No

- ▣ State v. Wyatt, 421 S.C. 306, 806 S.E.2d 708 (2017).

1. Witness Opportunity to view Perpetrator at time of crime

- ❑ Lighting – it was dark
- ❑ Perpetrator wearing a mask
- ❑ The crime took place very quickly

2. Degree of Attention

- ▣ Your eyes were closed during the rape
- ▣ You were distracted – trying to get the attention of others or worried about your children in next room

3. Accuracy of prior Description

- Broad general descriptions
- Discrepancies in the description

4. Level of certainty

- ❑ Confidence statements – “He looked most like the person who carjacked me and tried to kill me.” Not very confident!
- ❑ If no confidence statement – Argue State failed to prove witness was certain.

5. Length of time between crime and ID

- ❑ Were there intervening lineups shown to the witness?

Cross Examine the Officers

- ❑ Double Blind Administration
- ❑ Proper Lineup Composition – how was it done?
- ❑ Instructions to the witness
- ❑ Confidence Statements
- ❑ Record the ID procedure
- ❑ Sequential Presentation

Consider Hiring an Expert

- ❑ Memory fallibility/ Cross Racial ID
- ❑ Educate the judge

Motion to Suppress

- ❑ Argue that, in addition to the 5 reliability factors, the failure to follow proper procedures resulted in an inherently unreliable ID conducive to irreparable mistaken identification.

- ❑ 1. Move to Suppress Out of Court ID Procedure and Testimony

- ❑ AND

- ❑ 2. Move to Suppress any In court ID as being tainted by the suggestive and unreliable ID procedure

Motion Denied



Oh this is
bullshit...

FOUND AT VERYFUNNYPICS.EU



ID in at Trial – What do I do?

- ❑ 1. Challenge the witnesses with the reliability factors:
 - Opportunity
 - Degree of Attention
 - Accuracy of Prior Description
 - Level of Certainty
 - Length of time

ID in at Trial – What do I do?

□ 2. Challenge the procedure

- Double Blind Administration
- Proper Lineup Composition – how was it done?
- Instructions to the witness
- Confidence Statements
- Record the ID procedure
- Sequential Presentation

ID in at Trial – What do I do?

- ▣ 3. Use your expert to educate the **JURY**
- ▣ 4. Convince the jury that the ID is unreliable and the procedure used resulted in the misidentification of your client

ID in at Trial – What do I do?

Just in case you don't convince the jury

- 5. Preserve the ID issue for Appellate Review
 - Object to all **out of court** ID testimony and evidence from all witnesses at the time they testify – Contemporaneous Objection
 - Object to any **in court** Identification of your client

